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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LAWRENCE HOCHHEISER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL RIGHTS

This brief amicus curiae is submitted in support of the petition for certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit in Lawrence Hochheiser v. United States of America, 897 F.2d 1227 (2d Cir. 1990). Letters consenting to the filing of this brief have been received from the Solicitor General of the United States, counsel for the respondent, and from Vivian Shevitz, Esq., counsel for the petitioner, and have been forwarded to the Clerk of the Court under separate cover.

Interest of Amicus

The petition presents questions of great importance for defining the constitutional limitations on the summary contempt power. They arise in this case out of the summary contempt conviction of a lawyer for a single brief outburst pro-

voked by the lawyer's frustration at the court's refusal to let him utter one word in his own defense against a previous contempt citation founded on a misapprehendsion. This conviction for conduct which did not come close to obstructing the administration of justice flies in the face of ruling precedents of this Court, particularly In re McConnell, 370 U.S. 230 (1962), which capped a long history of efforts to check the unbridled exercise of the contempt power. Unfortunately, the petitioner's plight is not an isolated one. Herein lies the interest of the Center.

Founded twenty-four years ago as an outgrowth of the civil rights movement in the South, the Center provides legal support to individuals and groups whose constitutional rights have been infringed or denied. In our work we rely not only on

our own staff attorneys but on a network of cooperating lawyers and law professors throughout the United States. We often defend persons who have been prosecuted for exercising their constitutional rights. The causes we espouse are not always popular. Out of our own experience we know how important it is that a lawyer be free to defend his clients with vigor, even vehemence, without having to fear that he may be held in contempt if an excess of zeal leads him to overstep the bounds of courtroom propriety.

Because our own attorneys and cooperating attorneys have from time to time been held in contempt, we are sensitive to the dangers that an untrammeled contempt power presents for our own work and that of other public interest organizations which seek to defend and enlarge constitutional rights. Over the years we have

successfully defended lawyers in a number of contempt cases and related disciplinary cases, among them In the Matter of Pilsbury, 866 F.2d 22 (2nd Cir. 1989); United States v. Turner, 812 F.2d 1552 (11th Cir. 1987); In re Dellinger, 461 F.2d 389 (7th Cir. 1972); Matter of Hinds, 90 N.J. 604 (1982). We are currently representing a professor of law at the University of North Carolina in his appeal of a criminal contempt conviction in a North Carolina state court. In the Matter of Barry Nakell, North Carolina Court of Appeals, No. 89 GO 848. We are also consulted from time to time in other lawyer contempt cases. We were, for example, requested to submit an amicus brief in this Court in support of the petition in In the Matter of James B. Daniels v. Superior Court of the State of New Jersey, Docket No. 89-1972, and have recently filed a Motion for

Leave to File and Brief Amicus Curiae in that case.

This special experience has led us to conclude that the teachings of McConnell are being widely forgotten or ignored, with devastating consequences for the constitutional rights of lawyers and their clients, and explains our interest in submitting this amicus brief as well as the amicus brief in Daniels.

REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT

The petitioner, Lawrence Hochheiser, a New York criminal defense attorney, was summarily convicted in federal district court of criminal contempt of court, without any opportunity to present evidence in his own defense, for a single brief outburst in protest at the court's refusal to let him respond to an immediately previous contempt citation. Although his conduct

did not obstruct, or imminently threaten to obstruct, the administration of justice, the court of appeals, while reversing the first contempt conviction, affirmed the second on the ground that the petitioner's conduct affronted the dignity of the court. Such a basis for imposing contempt does not comport with the constitutional requirements for exercise of the summary contempt power as laid down by this Court in In re McConnell, 370 U.S. 230 (1962), In re Little, 404 U.S. 553 (1972), and many other cases. Permitting a disrespectful utterance, without more, to be grounds for contempt puts a damper on fearless advocacy by attorneys and diminishes the Sixth Amendment rights of their clients.

We point out that the facts and circumstances of this case parallel those of other lawyer contempt cases in which the

Center has been involved in representing or counseling attorneys held summarily in contempt. McConnell and Little are the culmination of a long historical struggle to limit the arbitrary power of judges to convict summarily without the ordinary due process safeguards. We fear that their teachings are now too often forgotten, and suggest that this petition and the petition in Daniels present an exceptional opportunity to reestablish needed limitations on the contempt power.

ARGUMENT

THE COURT SHOULD SEIZE THE OPPORTUNITY PRESENTED BY THIS PETITION TO REAFFIRM THE CONSTITUTIONAL LIMITATIONS ON THE POWER OF COURTS TO PUNISH SUMMARILY FOR CONTEMPT ATTORNEYS WHOSE CONDUCT HAS NOT ACTUALLY OBSTRUCTED THE ADMINISTRATION OF JUSTICE

1. The Circumstances of the Petitioner's Contempt Conviction

The petitioner, Lawrence Hochheiser, was convicted in the course of a long criminal trial for uttering a mere ten

words: "I won't pay. You can put me in jail, Judge." This spontaneous outburst followed on the heels of the judge's refusal to permit him to defend himself against a previous citation of contempt for what she had characterized as "deliberately" disobeying her ruling against the introduction of a police surveillance report. In two state court trials for the murder of a plain clothes police officer and attempted murder of his companion, Hochheiser's client, Federico Giovanelli, together with two codefendants, had either been acquitted, or the jury had failed to agree on a verdict. They were then indicted under RICO, with the murder and attempted murder among the underlying crimes. Critical to Giovanelli's defense in the federal trial was the credibility of the eyewitness testimony of an FBI agent, who had refreshed his memory of

observations made four years earlier by studying a surveillance log. When Hochheiser, in the course of his cross-examination of the agent, offered the log in evidence as past recollection recorded, the judge erroneously refused to receive it. Hochheiser continued his efforts to impeach the agent's credibility by determining what part of his testimony was based on actual recall and what part was based on studying the log. Mistakenly believing that Hochheiser was attempting to lay a foundation for another offer of the log in evidence, the judge twice tried to cut him short. When he persisted, she excused the jury and fined him $250 for "deliberately disobeying [her] direction with regard to the introduction of that document." This was the first contempt sanction.

When Hochheiser tried to explain that

he was not deliberately doing anything, the judge stopped him cold, saying:

> I'm not going to hear any more. There is only one way to bring lawyers into line, and that's to fine them. Before this trial is over, you may be paying a big bill in fines.

She ordered the jury brought in. It was at this moment, as the jury began to file in behind him from the rear of the courtroom, that Hochheiser erupted with the ten words that swiftly drew an additional fine of $500. The judge accused him of deliberately saying these words in the presence of the jury and refused to accept his statement that he did not know the jury were behind him.[1] In her Rule 42(a) Certificate, the judge accused Hochheiser of "deliberately trying to bring about a

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[1] Hochheiser never had an opportunity to present the testimony of others in the courtroom in support of the truthfulness of this statement.

mistrial" (Pet. App. at 20a-21a), a charge against which he could hardly defend himself since it was not made prior to his conviction.[2]

The facts demonstrate that the behavior for which the second fine was imposed cannot be considered apart from Hochheiser's stubborn efforts on behalf of his client. They indicate that his momentary explosion of anger, however improper and however offensive to the trial judge, was not calculated to disrupt the trial or otherwise obstruct or imminently threaten to obstruct the administration of justice, and did not in fact do so. It clearly sprang from his feelings of frustration at the court's adamant refusal, based on a misunderstanding of the tenor of his ques-

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[2] The judge later accused the attorneys for the defendants of being in a "contempt plot" as a tactic to bring about a mistrial.

tions, to let him pursue a crucial line of cross-examination of a dangerous witness, capped by her citing him for contempt without allowing him a word of explanation.

In affirming petitioner's conviction on the second contempt, the Court of Appeals relied principally on notions of "disrespect" and "affront to the dignity of the court." Pet. App. at 11a-12a. The opinion states:

> Words of reproach directed in open court to a judge's order must be dealt with swiftly and firmly, since to allow such conduct to go unsanctioned risks the serious erosion of the court's authority to control the proceedings before it.

Pet. App. at 3a. This generality hardly fits the case of an isolated and transitory outburst in a trial as to which the Court of Appeals itself noted its "hotly contested nature" and the "severity of the charges" against the defendants. Id. at

4a. In any event, a mere "risk" of erosion of a court's authority does not present an imminent threat of obstruction, let alone an actual obstruction, to the administration of justice, -- the constitutional minimum for the exercise of the summary contempt power. At the close of its opinion, the Court does state that the misbehavior "required" the jury to retire once again and "in that way" actually obstructed the administration of justice.[3] This is no more than a perfunctory recitation of the statutory for-

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[3] The Court states that the trial judge's finding that Hochheiser was aware when he spoke that several members of the jury were in the back of the courtroom is "persuasive." Pet. App. at 12a. Given the circumstances, it seems at best improbable; in any event, a persuasive finding is not a finding established beyond a reasonable doubt, the standard for a criminal conviction. The opinion does not allude to the judge's baseless finding that Hochheiser deliberately attempted to bring about a mistrial.

mula, a rationale that could be used to justify any judge's overreaction to an attorney's behavior. Plainly, it is "disrespect" that is at the core of the opinion, a standard that is constitutionally defective.

2. The Parallels to Other Attorney Contempts

The Hochheiser contempt conviction presents features that are found in a number of other attorney contempt cases in which the Center has been involved.

Jeopardy of Client. The attorney is faced with an adverse ruling which imperils the cause of his client and which he believes to be erroneous as a matter of law or based on a misunderstanding of the facts. This causes him to exceed the bounds of decorum in his efforts to overcome the ruling, arousing the judge's ire.

Gross Blunder by the Court. Sometimes

the court takes a position that appears so unjustifiable to the attorney that he involuntarily lets his frustration show in a manner that offends the judge. This happened to Hochheiser, confronted in succession not only with adverse rulings that could emasculate the defense but a contempt citation to which he could not respond.

Court's Perception of "Body Language." An overly sensitive judge reads into an attorney's demeanor, facial expression or tone of voice an intent to insult or mock the court, even where the content of the attorney's language has been uniformly respectful, or it is clear that the attorney's misbehavior is not calculated, but a momentary lapse. The court dismisses any apology or explanation. In the present case, the trial judge kept imputing a "deliberate" character to Hochheiser's ac-

tions without any apparent basis.

Court's Bias Against Party. The judge exhibits antagonism to the attorney's client because of the nature of the offense with which he is charged or the rights he is seeking to enforce. This antagonism may then be transferred to the attorney, a transfer that may readily occur when a rambunctious defendant engages in courtroom antics. The judge's hostility in the present case was displayed by her intimidation of the lawyers with threats of escalating fines, conveyed in harsh language.

Disruption Caused by Court. The court proceedings are unnecessarily interrupted by a judge who takes umbrage at what he perceives to be disrespect by the attorney and orders his ejection from the courtroom or pronounces summary contempt. The attorney does not intend or foresee

such an interference with the orderly administration of justice and should not be held accountable therefor.

We recognize that there have been instances when a lawyer has deliberately and repeatedly provoked the court in order to gain the attention of the press or create grounds for a mistrial. Such behavior is plainly punishable as an obstruction to the administration of justice. Not so, conduct which erupts in the tense atmosphere of a trial where the attorney is simply doing his utmost to protect the interests of an endangered client.

3. Origins of the Constitutional Limitations on the Contempt Power

The contempt power of a federal court is limited by statute, in the case of conduct taking place before it, to "misbehavior of any person in its presence or so near thereto as to obstruct the ad-

ministration of justice." 18 U.S.C. § 401(1). This restriction is rooted in constitutional considerations that arose in the impeachment trial of James H. Peck, a federal district judge who had imprisoned a lawyer for publishing a criticism of one of his opinions in a case on appeal. Judge Peck was acquitted by a single vote after a trial that continued over a period of almost two months.[4] The day after his acquittal Congress took steps to provide for a drastic delimitation of the federal contempt power. Within a few days James Buchanan, the principal manager of the case against Peck (and afterwards elected President), brought in a bill that became the Act of March 2, 1831, 4 Stat. 487. This Act,

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[4] The trial is reported in full in Stansbury, Report of the Trial of James H. Peck on an Impeachment for High Misdemeanors in Office (1933).

"declaratory of the law concerning contempts of court," confined the summary contempt power, inter alia, to misbehavior "in the presence of said courts, or so near thereto as to obstruct the administration of justice," -- language almost identical with that now found in 18 U.S.C. § 401(1). See, Nye v. United States, 313 U.S. 33, 44-46 (1941).

The arguments by Buchanan and other managers of the case against Peck demonstrate that their passionate opposition to the broad contempt powers urged by those charged with Peck's defense sprang from their conviction that such powers contravened the principles for which the Revolution was fought and threatened liberties guaranteed by the Constitution. Constitutional concerns were at the heart of the impeachment proceedings and the legislation that ensued.

The arguments of the managers against untrammeled powers of summary contempt reflect concerns that persevere to this day: the lack of ordinary due process with the concentration of all powers in the judge; the absence of any clear standard; dependence on the temperament of the judge. As expressed by Buchanan: "the dearest rights of a citizen may be taken away without trial by jury, and by the sole authority of an angry, offended, and therefore partial judge." Stanbury, op. cit., at 445-46. The managers recognized the "plea of necessity," the right of a court to preserve its own functioning; but, as stated by M'Duffie, this plea must be "pleaded in good faith, and clearly made out. It must be a case of actual necessity, obvious to the common sense of every impartial person. The administration of justice must be actually obstruct-

ed." Id., at 87. The managers were unanimous that this was a constitutional minimum.

4. Actual Obstruction as the Sine Qua Non for Constitutional Exercise of the Contempt Power

Seventy years ago, in Ex parte Hudgings, 249 U.S. 378 (1919), this Court, in overturning the contempt conviction of a witness for perjury, enunciated the principles that set constitutional boundaries to the contempt power. It held that the existence of this power expressed no purpose to exempt judicial authority from constitutional limitations, since "its great and only purpose" is to secure judicial authority from obstruction to the performance of its duties:

> An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest.

249 U.S. at 383.

In a number of later cases this Court has plainly read the statutory requirement of actual obstruction as a constitutional limitation deriving from the Peck trial. Nye v. United States, supra; In re Michael, 326 U.S. 224, 227 (1945); Cammer v. United States, 350 U.S. 399, 406 (1956). In Bridges v. California, 314 U.S. 252 (1941), this Court struck down, as violative of the First Amendment, the power of a judge to punish publications as contempts on a finding of "a mere tendency" to interfere with the orderly administration of justice in a pending case. Reviewing the "celebrated case of Judge Peck," the Court concluded:

> But we do find in the enactment [of the Act of 1831] viewed in its historical context, a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be

tolerated.

314 U.S. at 267.

Bridges demonstrates that the limitation of the contempt power to actual obstruction serves to protect, among other rights, the First Amendment right of free expression which, under the Fourteenth Amendment, binds the states. In In re Oliver, 333 U.S. 257, 275 (1948), this Court reversed a Michigan contempt conviction for failure to meet due process safeguards, stating that the narrow exception to such due process requirements includes only charges of misconduct, in open court in the presence of the judge, which disturbs the court's business and where "immediate punishment is essential to prevent 'demoralization of the court's authority . .. before the public.'"

In a multitude of cases this Court has shown its continuing sensitivity to the

potential for abuse which resides in the summary power of contempt. The vulnerability of the judge is a frequent theme. In Bloom v. Illinois, 391 U.S. 194, 202 (1968), which extended the constitutional guarantees of jury trial to state prosecutions for serious criminal contempts, this Court commented:

> Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament.

Again, in Offutt v. United States, 348 U.S. 11, 13 (1954), remanding a contempt conviction for a second hearing by another judge because the trial judge had become personally embroiled with counsel for the defendant, this Court said:

> The power thus entrusted to the judge [to punish without the formalities required by the Bill of Rights] is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges are human, and may, in a human way, quite unwittingly identify offense

to self with obstruction of law.

Cf. Brown v. United States, 356 U.S. 148, 153 (1958), where this Court warned trial judges against "confusing offense to their sensibilities with obstruction to the administration of justice."

5. Constitutional Limitations in Lawyer Contempts

The danger of confusing perceived offense with actual obstruction looms large when confrontations arise between judge and lawyer over disagreement on the judge's rulings. Here not only First Amendment and due process considerations come into play, but also the need to give uninhibited effect to the Sixth Amendment right of a criminal defendant to assistance of counsel. In such situations this Court has required a clear showing of actual obstruction of justice. In re McConnell, 370 U.S. 230 (1962). The lawyer in

this case, after being instructed by the judge in the presence of the jury to refrain from repeatedly asking questions on certain subjects which the court had ruled were not admissible, persisted in asserting his right to ask the questions and announced that he "propose[d] to do so unless some bailiff stops us." After a short recess requested by his co-counsel, the lawyer did not continue to ask the forbidden questions. In reversing his conviction for contempt, this Court said:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

370 U.S. at 236. Cf. Holt v. Virginia, 381 U.S. 131 (1965) (reversing on Sixth Amendment grounds the conviction of a lawyer for using "vile, contemptuous or in-

sulting language" in violation of the Virginia contempt state; In re Little, 404 U.S. 553, 555 (1972) (pro se criminal defendant in state court "clearly entitled to as much latitude in conducting his defense as enjoyed by counsel vigorously espousing a client's cause").

There was no clear showing in this case that Mr. Hochheiser actually obstructed or imminently threatened to obstruct the administration of justice. His case displays many of the features catalogued by Buchanan and his confreres as leading to dangerous oppression when the contempt power is untrammeled: a lawyer unable to mask his involuntary feeling that the judge's ruling was absurd, judicial hostility, the susceptibility of the judge, the offended judge as sole arbiter of the offense imposing punishment before "his resentment should have time to cool," con-

struing the lawyer's actions as deliberately disrespectful unheeding of his disavowals. A judge may not constitutionally be permitted to "carry the standard in his own breast."

We respectfully suggest that this petition presents an exceptional opportunity for the Court to reassert the constitutional limitations on the exercise of the summary contempt power and thereby provide much needed guidance both to the federal courts and the courts of the fifty states. We suggest, also, that the Court likewise agree to hear the petitioner in In re James B. Daniels v. Superior Court of the State of New Jersey, Docket No. 89-1972, which presents similar issues of lawyer contempt, and that it consider the two petitions jointly.

CONCLUSION

For the reasons stated, we respectfully urge that the petition be granted.

Respectfully submitted,

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